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Judicial Activism: Judiciary in Search of a Role in the Age of Corporations*

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I. Introduction

The present essay grew out of my reflection on the ongoing controversy about judicial activism in India. Those, who are pro-judicial activism, see it as legitimate extension of the function of judiciary for the protection of rights granted by social justice, while those who are anti-judicial activism see it as an attempt by judiciary to usurp the powers of legislature and executive in the name of rights protected by social justice.

In the present essay I have tried to solve this controversy in favour of judicial activism by following a line of thought which I pursued in my earlier essay "A Normative Theory of Interpretation of the Fundamental Rights Vis-a-vis the Directive Principles of State Policy"[1]. There I claimed, "...the theory of political morality developed by John Rawls comes closest to making sense of our constitution as a whole and is tailor made for the constitutional debate over the Fundamental Rights versus the Directives that we have witnessed in India"[2]. In that essay I further claimed "the value structure identified by the public political morality that justifies our constitution is its basic structure"[3]. So I had tried to identify some salient features of the basic structure of our constitution on the basis of Rawlsian Theory of political morality in that essay.

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Now Rawls himself has further extended his theory of justice in *Political Liberalism*.[4] There he has introduced a new concept not present in his a *Theory of Justice*.[5] This is the concept of *constitutional essentials*. The idea of constitutional essentials as conceived by Rawls comes very close to (I think it is identical with) the idea of basic structure of constitution as conceived by our higher judiciary in *Keswanand Bharati* and elaborated in subsequent judgements much earlier than Rawls.

According to Rawls in the determination of constitutional essentials we have to be guided by public reason and in the context of explaining the structure of public reason and the kind of constitutionalism that it gives rise to, Rawls discussed the role of judiciary as protector and exemplar of public reason. This led me to explore an area yet unexplored by Rawls himself – i.e. the question of what is the structure of litigation in the context of courts being protector and exemplar of public reason in the social setting which Rawls has accepted. My exploration of this question led to the structure of litigation that turned out to be structure of the public interest litigation as conceived in the Indian legal circles or structural suit as conceived by American legal theorists. Here Owen M.Fiss's articulation of what is a structural suit came very handy. From the structure of structural suit the judicial activism follows by social necessity.

Since the social setting, in which Rawls is developing his liberal theory, is equally available in the Indian context, one can come to grips with judicial activism if one analyses it in light of Rawls's theory of justice. The present paper is an attempt in that direction.

The questions which I have tried to answer are the following: Firstly, *what are the new social realities* which have necessitated the reinterpretation of role of judiciary in the direction of judicial activism? Secondly, *what are the principles of new constitutionalism* commensurate with the new social realities which have led to the reinterpretation of role of judiciary in the direction of judicial activism? Thirdly, what changes in the structure of litigation are taking place under the impact

of role of judiciary under the new constitutionalism which is leading to judicial activism? Fourthly, what are the arguments in favour of reinterpreting the role of judiciary in the direction of judicial activism as against the arguments advocated by the opponents of judicial activism? And lastly, what should be the basis of guidelines to regulate the exercise of power by judiciary in the new regime of judicial activism.

II. New Social Realities

According to Rawls, "An essential feature of the contractarian conception of justice is that the basic structure of society is the first subject of justice".[6] Explaining what he means by "the basic structure of society", he writes, "The basic structure is understood as the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation. Thus the political constitution, the legally recognised forms of property, and the organization of the economy, and the nature of the family, all belong to the basic structure."[7] So Rawls argues, "The initial objective of the theory is to find a conception, the first principles of which provide reasonable guidelines for the classical and familiar questions of social justice in connection with this complex of institutions."[8]

Traditionally either the person or the action of the person is taken as the primary subject of justice. Rawls's theory of justice involves radical rethinking about the conception of justice by radically departing from the traditional subject of justice. This rethinking and departure is necessitated by the emerging new social realities. The new reality is that in society the individual is no more a major player, rather large institutions and corporations have become the major players. Governance is no more by a single sovereign but by numerous bureaucracies. In market individuals are insignificant force compared to the large corporations. In politics individual legislators are not so significant, rather political parties, as strong organizations, have emerged as major factors in politics. In fact the anti-defection law has now given the political parties a constitutional role

in India. In civil society educational institutions and religious institutions have also emerged as major forces. Rawls's theory takes note of this reality and reinterprets the concept of justice to take the complex of these institutions as the primary subject of justice.

That individuals have come under the sway of institutions is also recognized in Rawls's principles for individuals. The principle of fairness, which gives rise to obligations, "...holds that a person is required to do his part as defined by the rules of an institution when two conditions are met: first, the institution is just (or fair), that is, it satisfies the two principles of justice, and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests."[9] Similarly the duty of justice, which is one of the fundamental natural duties recognized by Rawls's theory of justice, requires persons "to support and to comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established at least when this can be done without too much cost to ourselves"[10]. So the picture of social justice advocated by Rawls is that the principles of justice regulate the institutional framework of the society and individuals are required to obey the laws of these institutions when they are just. So institutions and corporations have emerged as new factors which regulate the life of persons according to Rawls.

How do these institutions regulate or affect the life of persons? The answer to this question emerges in the context of the arguments that Rawls gives for taking the complex of institutions as the primary subject of justice. According to Rawls the question of the justice of basic structure of a society arises because of four reasons. Firstly some inequalities are inevitable in the basic structure of society and they effect persons' initial chances in life.[11] Secondly "...the social system shapes the wants and aspirations that its citizens come to have. It determines in part the sort of persons they want to be as well as the sort of persons they are."[12] The third reason is that the basic structure of a society even under favourable

conditions includes some machinery of legal coercion if only to guarantee the stability of social cooperation.[13] And lastly "The role of the basic structure is to secure just background conditions, against which the actions of individuals and associations take place. Unless this structure is appropriately regulated and corrected, the social process will cease to be just however free and fair particular transactions may look when viewed by themselves."[14] So the complex of institutions and corporations influence the initial prospects of a person, determine how he conceives himself to be and what he can aspire to be, use coercive power, and if they become unjust destroy the justice of the social process itself in which persons find themselves caught up. So according to Rawls there is a need for this complex of institutions corporations to be just.

The power of institutions and corporations to affect and influence individuals and consequent need to regulate and correct them if they result in injustice gives rise to judicial activism. This point will be taken up in detail subsequently.

III. The New Constitutionalism

Rawls has raised the question of justice of complex of institutions and corporations in the context of and as a part of the problem of stability of liberal democratic society in the emerging social conditions. Rawls asks, "how it is possible for there to exist over time a just and stable society of free and equal citizens who still remain profoundly divided by reasonable religious, philosophical and moral doctrines?"[15] Rawls's answer is that such a society is possible provided, "The basic structure of such a society is effectively regulated by a political conception of justice that is the focus of an overlapping consensus of at least the reasonable comprehensive doctrines affirmed by its citizens,"[16] and when this enables the "shared political conception to serve as the basis of public reason in debates about political questions when constitutional essentials and matters of basic justice are at stake."[17] So the stability of a liberal democratic society depends partly on the justice of the complex of institutions operating in that society. That is to say the injustice of the institutional

arrangement threatens the stability of the liberal democratic society.

The political conception of justice that is the focus of an overlapping consensus of at least the reasonable comprehensive doctrines affirmed by citizens, according to Rawls, requires that the basic structure of society to be just must be regulated by the following two principles.

a. "Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all, and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value."[18]

b. "Social and economic inequalities are to satisfy two conditions. First, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society."[19]

The first principle of justice according to Rawls is lexically prior to the second principle i.e. the second principle does not come into operation unless the first principle is fully satisfied or does not apply. Hence liberty cannot be restricted for economic and social benefits. Liberty can be restricted for the sake of liberty only.[20]

According to Rawls the scheme of basic rights and liberties is specified by a list. He writes, "The basic liberties of citizens are roughly speaking, political liberties (the right to vote and to be eligible for political office) together with freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person along with the right to hold (Personal) property, and freedom from arbitrary arrest and seizure as defined by the concept of rule of law."[21]

The two principles must regulate the institutional complex of the society. Since the complex of institutions includes the political constitution of the society, the above principles must regulate the constitution of society. Hence according to Rawls "a citizen must decide which constitutional arrangements are

just for reconciling conflicting opinions of justice."[22] The citizens must adopt the standpoint of the members of an ideal constitutional convention where "subject to the constraints of the principles of justice already chosen, they are to design a system for the constitutional powers of government and the basic rights of citizens."[23]

According to Rawls, "Ideally a just constitution would be a just procedure arranged to ensure a just outcome. The procedure would be the political process governed by the constitution, the outcome the body of enacted legislation, while the principles of justice would define an independent criterion for both procedure and outcome."[24] According to Rawls to achieve this ideal, "the liberties of equal citizenship must be incorporated into and protected by the constitution."[25] For Rawls a constitutional democracy would not be just if it does not embody the basic rights and liberties.

At the same time Rawls also recognizes the impossibility of achieving the ideal, "...clearly any feasible political procedure may yield an unjust outcome. In fact, there is no scheme of procedural political rules which guarantees that unjust legislation will not be enacted.... Nevertheless some schemes have a greater tendency than others to result in unjust laws". Hence from the point of view of the members of ideal constitutional convention another problem is "to select from among the procedural arrangements that are both just and feasible, those which are most likely to lead to a just and effective legal order."[26]

According to Rawls if the principle of equal liberty is to be embodied in the constitution and the constitution has to define political procedure to ensure greater likelihood of just outcome then the constitutional arrangement must satisfy the principle of equal participation which "requires that all citizens' are to have an equal right to take part in, and to determine the outcome of the constitutional process that establishes the laws with which they are to comply."[27] The argument for this is that, "if the state is to exercise a final and coercive authority over a certain territory, and if it is

in this way to affect permanently men's prospects in life, then the constitutional process should preserve the equal representation of the original position to the degree that this is feasible."[28]

Constitutional democracy is one such political system which can satisfy the principle of equal participation provided that in this system "the authority to determine basic social policies resides in a representative body selected for limited terms by and ultimately accountable to the electorate."[29] That is to say that this representative body must have more than a purely advisory capacity i.e. it must be a legislature with lawmaking powers.[30] In a just constitutional arrangement this principle of participation must be limited by traditional devices of constitutionalism like bicameralism, separation of powers mixed with checks and balances a bill of rights with judicial review, provided equal worth of political liberties is maintained for all.[31]

According to Rawls from the point of view of the constitutional convention the first principle of equal liberty is the primary standard. The second principle comes into play at the stage of the legislature, Rawls writes "Thus the priority of the first principle of justice to the second is reflected in the priority of the constitutional convention to the legislative stage."[32]

In political philosophy of Rawls, "There is the greatest urgency for citizens to reach practical agreement in judgements" about the following two types of constitutional essentials[33]:

"a. fundamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule; and

b. equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association as well as the protections of the rule of law."[34]

The need for agreement on the first kind of constitutional essentials arises because, "Frequent controversy over the structure of government, when it is not required by political justice and when the changes proposed tend to favour some parties over others, raises the stakes of politics and may lead to distrust and turmoil that undermines constitutional government."[35]

Rawls has explained that the kind of constitutionalism he advocates involves five principles. The first principle involves the distinction "between the people's constituent power to establish a new regime and the ordinary power of officers of government and the electorate exercised in day-to-day politics. That constituent power of the people... sets up a framework to regulate ordinary power and it comes into play only when the existing regime has been dissolved."[36] The second principle involves, "the distinction between higher law and ordinary law. Higher law is the expression of the people's constituent power and has the higher authority of the will of "we the people", whereas ordinary legislation has the authority, and is the expression of the ordinary power of congress and of the electorate. Higher law binds and guides this ordinary power."[37] According to third principle, "a democratic constitution is a principled expression in higher law of the political ideal of a people to govern itself in a certain way."[38] These values may be stated in a preamble, embodied as constraints in a bill of rights or implied in a framework of government.[39] The fourth principle is "...that by a democratically ratified constitution with a bill of rights the citizen body fixes once and for all certain constitutional essentials. It is through these fixed procedures that the people can express, even if they do not, their reasoned democratic will, and indeed without those procedures they can have no such will."[40] The last principle is that "in constitutional government the ultimate power cannot be left to the legislature or even to a supreme court, which is only the highest judicial interpreter of the constitution. Ultimate power is held by the three branches in duly specified relation with one another with

each responsible to the people."[41]

Since constitutional democracy is based on distinction between constituent power and ordinary power as well as between the higher law of the people and the ordinary law of legislative bodies, it rejects parliamentary supremacy and accepts supreme court and higher judiciary as one of the institutional devices to protect the higher law.[42] Since higher law implies the public political values, the role of Supreme Court is to protect these values also. So in a dualist constitutional democracy the role of higher judiciary is to prevent the higher law and public values "from being eroded by the legislation of transient majorities, or more likely, by organised and well situated narrow interests skilled at getting their way."[43]

Rawls argues, "If the court assumes this role and effectively carries it out, it is incorrect to say that it is straight forwardly anti-democratic. It is indeed anti-democratic with respect to ordinary law for a court with judicial review can hold such law unconstitutional. Nevertheless, the higher authority of the people supports that. The court is not anti-majoritarian with respect to higher law when its decision reasonably accord with the constitution itself and with its amendments and politically mandated interpretations."[44]

According to Rawls there is another role of higher judiciary in a constitutional democracy. That role is "to give due and continuing effect to public reason by serving as its institutional exemplar."[45] To serve as an institutional exemplar of public reason requires three things. One, courts can appeal only to public political values. Judges cannot "invoke their own personal morality, nor the ideals and virtues of morality generally.... Especially, they cannot invoke their or other people's religious or philosophical views. Nor can they cite political values without restriction. Rather, they must appeal to political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason."[46] Second, as an exemplar of public reason higher judiciary must "try to develop and express in their reasoned opinions the best interpretation of the constitution they can,

using their knowledge of what the constitution and constitutional precedent requires."[47] Here the best interpretation is the one that best fits the relevant body of constitutional materials like the constitutional cases, practices and traditions, and constitutionally significant historical texts and justifies it in terms of the public conception of justice or a reasonable variant there of.[48] And the third and last aspect of court's role as exemplar of public reason is that it must "give public reason vividness and vitality in the public forum, this it does by its authoritative judgements on fundamental questions."[49] According to Rawls, "The court fulfills this role when it clearly and effectively interprets the constitution in a reasonable way, and when it fails to do this... it stands at the center of a political controversy the terms of settlement of which are public values."[50]

Hence it follows that, "The constitution is not what the court says it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the court to say it is."[51] This holds good all the more where legislature has the power to amend the constitution and where the executive has the power to bring a bill for amendment of constitution in a legislature.

So far we have been thinking along with Rawls. Now we have to depart from his way of thought and explore an area not explored by Rawls. Rawls has emphasised role of higher judiciary in a dualist constitutional democracy, that is, protection of higher law against legislative by being an institutional exemplar of public reason. But there is also another role that is mandated by his political conception of justice that higher judiciary must assume and which requires radical rethinking about the nature of adjudication.

According to Rawls, the public political values identified by his political conception of justice regulate the basic structure of society i.e. the complex of major institutions and organizations whether political, economic or social. So the protection of higher law and constitutional values requires that these values must be given meaning in the operation of this institutional

complex. The constitutional values and the higher law can be eroded not merely by legislative excesses or due to lack of guidance about the use of public reason on the part of citizens but also by the operation of other institutions which go on to make the basic structure of society. So occasions may arise when the constitutional values cannot be protected without bringing changes in the complex of institutions as it exists. So higher judiciary can be called upon to protect the constitutional values against the threat that the present institutional arrangement poses to them. Hence the higher judiciary may be called upon to eliminate such threats by restructuring the institutions and corporations.

IV. The Emerging New Form of Litigation

When the courts are called upon to restructure an institution or corporation to eliminate threat to constitutional values, the suits that courts have in front of them are called structural suit by Owen M. Fiss.[52] "As a genre of constitutional litigation, structural reform has its roots in the Warren Court era, and the extra-ordinary effort to translate the rule of Brown v. Board of Education into practice."[53]

Indian higher judiciary is also called upon to undertake this task in numerous public interest litigations involving ministries, investigating agencies like C.B.I. and police, penal institutions, educational institutions, business corporations etc. Although a full scale institutional reorganization is yet to be attempted by Indian higher judiciary yet it is showing definite trends towards that direction.

The structural suit is a form of injunctive litigation, since the institutional reconstructive directives have to be transmitted by means of injunctions. But injunctive litigation vests quite a great power in the hands of judges. No doubt there is a cry against it that judges are usurping the power of executive under the guise of such litigation.

In a structural suit the judge is required to protect the constitutional value by restructuring the institution to remove the threat posed to the constitutional value by the institution

under consideration. This requirement necessitates rethinking about the form of the lawsuit. The traditional form of lawsuit is not suitable here. Owen M. Fiss describes vividly the traditional individualistic triadic dispute resolution model of lawsuit, "as a conflict between two individuals, one called plaintiff and the other defendant, with a third standing between the two parties, as a passive umpire, to observe and decide who is right, who is wrong, and to declare that the right be done."[54] The structural suit will require radical transformation of this model of lawsuit.

The traditional law suit focuses on the incidence or occurrence of wrong doing or an illegal 'transaction'. But structural lawsuit focuses not upon particular incidence or occurrence of wrong doing like non-fulfilment of obligation or breach of duty but upon the conditions created by an institution, which threatens important constitutional values.[55] For example systematic failure of the investigating organization to carry investigations when politically significant agents are involved, which threatens the constitutional value of "equality before laws" involved in the rule of law.

In a structural suit not only the focus of the suit shifts, but also the party structure undergoes radical change. In the traditional lawsuit the three components of the plaintiff i.e. the victim, the spokesman and the beneficiary are united in a single agency. But in a structural lawsuit the three components of the plaintiff fall apart and separate out. The unity of the three components in a single plaintiff disintegrates.[56]

In a structural suit the victim is generally not a single individual but a group which may or may not have an identity apart from the institution or the conditions created by the institution of which they are the victims. Sometimes the victim may not be visible at all as the entire society as a whole is victim.

In the structural suit since there is either no visible victim or the group is so vulnerable vis-a-vis the organization of which he is the victim, to insist upon the requirement that the

spokesman must also be the victim is nothing less than either being insensitive to the threat to the constitutional values or being cruel. Hence in the structural suit generally the spokesman need not be the victim.[57] Indian higher judiciary has already taken cognizance of this by admitting the legal and constitutional tenability of public interest litigation. Public interest litigation are precisely these suits where the spokesman who brings the suit is different from the victim of the condition maintained by the acts of omission or commission of any institution or organization.

In the context of structural suit the relation between victim and the spokesman is not that of identity but is entirely instrumental.[58] Hence in such suits the judges are required to determine whether the interests of the victim are adequately represented. The courts must ask the spokesman whether he is an adequate representative. Since there is only an instrumental relation between the victim and spokesman in the structural suit, there can be multiplicity of spokesman representing different views as to what is in the interest of the victim group. In the structural suit it need not be the case that all those on the plaintiff's side are equally antagonistic to all those on the defendants.

In the structural suit the group who benefits from the remedy granted, need not coincide with the group who is the victim. This arises because of group nature of victim and more fundamentally from the instrumental nature of the remedy. Exercise of all governmental power is constrained by consideration of efficiency and fairness and hence in the structural suit these considerations may lead the courts to structure the beneficiary class so that it is not coextensive with the victim group.[59] For example when a corporation is asked to shift its pollutant factory, the beneficiary class of this remedy may be far wider than or at least may not coincide with the original victim group or the future victim group.

In a structural litigation the three components of the defendant i.e. spokesmen, wrongdoer and the addressee or the person who must provide the remedy fall apart.[60] In a

traditional lawsuit all these three are united in a single defendant.

In the context of structural suit since the focus is on the condition created by the functioning of an organization, the remedy prayed for is an injunction and hence it does not require a judgement about wrongdoing, future or past.[61] The temporary injunctive restructuring of C.B.I. in recent cases are done by courts without passing any legal judgement on the wrongdoing on the part of higher ups in the organization. In the structural suit the restructuring of the organization is done not because it has "done wrong" in literal or metaphorical sense but because reform is needed to remove a threat to constitutional values posed by the operation of the organization.

In a structural suit the directives are addressed to some office in the organization or the institution, but not necessarily to the person who happens to occupy the office at any specific time. These directives are given to the office not because the present or the prior occupant of the office is guilty of wrong doing but rather because the judicially prescribed action is necessary to eliminate the threat that the functioning of the institution as a whole poses to the constitutional values.

In the traditional dispute resolution litigation judge is merely an observer between the two disputants and hence plays a passive role. He has to rely on the initiatives of the disputants for the presentation of the facts and the law and the articulation of the possible remedies. But in structural litigation the falling apart of the various functions on the side of both the plaintiff and the defendant necessitates the abandoning of passive posture on the part of judges and that means structural suit requires judicial activism. Complete reliance on the initiative of the parties before the court in structural suit is not tenable.

In such suit on the side of the plaintiff the spokesmen elect themselves to be the spokesmen of the victim. There is no guarantee that they adequately represent the interest of the group whom they are representing. Similarly on the side of the defendant, the named defendant need not be an adequate representative of the interest of the organization,

he is representing since he is elected by the adversary. The presence of an improper representative on either side of the structural lawsuit may have consequences that far transcend the interests of the participants. The self-elected spokesman on the side of the plaintiff may compromise the interest of the victim group in a way that cannot easily be rectified in subsequent proceedings. Similarly on the side of the defendant the spokesman elected by the adversary may not be able to protect the interest of all who have a stake in the organization in some way or the other.

Hence the responsibility falls on the judge to ensure adequate representation of all who have a stake involved. Since the judge must not take this responsibility of representation, he can invite the parties, purportedly represented in the lawsuit independently. The judge can also invite certain organizations or agencies to participate in the lawsuit as an amices or as a party or as a hybrid. Judges can also create their own agencies such as special masters to correct any representational inadequacies.

The remedial phase in the structural litigation differs from the remedy of the traditional dispute resolution litigation. In the later case the remedy is designed to ensure or prevent a discrete event and the judicial function ends when the judgement is announced and the discrete event of omission or commission ensues. The litigation is not episodic. It involves a long, continuous relationship between the judge and the institution. It is concerned not with the enforcement or a remedy already given out but with the giving or shaping of the remedy itself. The remedy involves the court in the continuous reorganization of an ongoing institution so as to remove the threat it poses to constitutional values. The court's jurisdiction will last as long as the threat persists. No doubt the higher judiciary is involved continuously in the functioning of the C.B.I. in recent cases. A long term supervisory relationship develops between the judge and the institution, for performance must be monitored and new strategies must devised to make sure that the operation of the organization is kept within the

constitutional bounds.

V. Arguments for Reinterpretation of Role of Judiciary

Since the courts exist to give meaning to constitutional values in a dualist constitutional democracy, the structural suit is the primary mode of discharging this function on the part of the courts in the changed social realities. Dispute resolution may be consequence of the original function of the courts but certainly it is not its primary function. Dispute resolution can be left for arbitration, tribunals or *lokadalats.*

Here it may be argued that in a dualist constitutional regime although the courts have to interpret and protect the higher law and the constitutional value yet restructuring of the complex of institutions to give meaning to these values must be left to other agencies like legislature or executive branch of the government. The argument is based on the premise that these agencies have special expertise in the reorganization on ongoing social institutions which is not available to the courts.

The reply to the above argument is that when it is argued that the courts have to discharge the function of restructuring a social institution through structural suit, it is not to deny other agencies, the power of structural reformation through their own instrumentalities like executive orders or legislation. What the critics need to argue is that because these other agencies have special competency in structural reformation, it altogether ousts the courts from undertaking structural reformation to give meaning to constitutional values through structural suit. So far it is only an assertion that constitutional agencies other than courts have some expert knowledge. No evidence of this has come so far. If there is such a body of relevant knowledge, it is not clear why it can't be available to the courts, say either through expert witness or through auxiliary officers of the court. Hence this argument to deny to courts, the role of restructuring institutions through structural litigation fails. In fact this argument fails to understand and argue why the courts are called upon to entertain the structural

suit. The argument is based on the premise that the courts are the guardians of the higher law in a dualist constitutional regime and that they have a special competency of giving meaning to constitutional values, since the courts are the exemplars of public reason and it is their sole reason. Other agencies for example the legislators, "...need not justify by public reason why they vote as they do or make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions."[62] Hence they may be voting their personal preferences. Hence these other agencies cannot be given the sole responsibility of structural reformation to give meaning to the constitutional values. They lack independence that is so essential for giving expression to our constitutional values.

The above Rawlsian normative theoretical perspective apart, even traditionally the higher judiciary has performed the task or function of giving meaning to our public values. And now it is trying to perform this function in a changed public culture which is dominated by the operation of large scale organizations. It is to perform the function traditionally assigned to the judiciary in the changed social world that judiciary is also evolving its adjudicatory forms which is reflected in the increasing judicial activism.[63] The normative perspective of Rawls matches very well with the emerging adjudicatory forms. If the judiciary were to fail to evolve this new form of adjudication it will also fail in discharging its constitutional responsibility in the changed social reality.

But it needs to be recognized that this evolving form of adjudication which is also having normative support of Rawls's theory of justice violates the right of the individual to participate in a proceeding that might adversely affect him due to the nature of representation involved. According to Fiss, "this right, taken in its highly individualistic cast, is denied, indeed seriously compromised by the kind of representation lying at the heart of a structural suit – the representation of interests by spokesmen for groups and offices rather than identifiable individuals."[64] The reply to this is that first of all as implicit in the public

culture of a democratic polity this principle, if at all applicable, is applicable only to that adjudication which is only dispute resolution. This principle is not applied to constitutional adjudication, for even without the new form of adjudication when courts, interpreted the constitution and gave their ruling which affected it, never had the right of participation individually. A precedent binds all even if they had no chance to participate in that litigation. If the right of participation is taken seriously in its individualist cast, then the doctrine of precedent has to be given up. Hence the right of participation in the proceeding that may adversely affect an individual cannot be taken as part of our considered judgements of justice in reflective equilibrium.

It may be argued that according to Rawls an ideal constitution embodies the principle of participation which says, as explained earlier, "that all citizen's are to have an equal right to take part in and to determine the outcome of the constitutional process that establish the laws with which they are to comply", and now we are denying the right of participation in the courtroom proceeding which results in precedent binding all with force of law. Is it not a contradiction? The solution of this apparent contradiction is at two levels. At the first level the principle of participation is applicable only to that mode of determination of law which is legislation. It is not applicable to that mode of determination of law which is precedent. At the second level, in the case of legislation as a mode of determination of law, the principle of participation is satisfied if citizen is given a right to participate in the election of legislators and after that the participation is indirect through representation by legislators. In case of structural suit no doubt the principle of participation is directly not applicable yet virtual participation is ensured by remaining within the limits of public reason. Public reason as explained before is the reason of the citizens, so when the case is decided on the sole basis of public reason even though there is no direct participation of the victims individually, as the spokesman need not be elected by them, it cannot be denied that he participates virtually

like the participation of all in the hypothetical original position of Rawls's theory of justice and like the participation of all in "we the people of India" in the preamble of the constitution. Without this theory of virtual participation we will not be able to say as the new constitutionalism requires that even when courts are anti-majoritarian with respect to ordinary power, yet they are not anti-majoritarian with respect to higher law and exercise of higher constituent power, when its decisions reasonably accord with the constitution itself and with its amendments and politically mandated interpretations.

It may further be argued that judiciary is given the power to protect the higher law through the power of review in a dualist constitutional democracy because of two factors. One, the exercise of that power is constrained by participation in a dialogue with following limitations: (a) Judges are not in control of their agenda, but are compelled to confront grievances brought to them by others (b) Judges do not have complete control over whom they must listen to. They are bound by rules requiring them to listen to a broad range of persons or spokesmen. (c) Judges are compelled to speak back, to respond to the grievances or claims, and to assume individual responsibility for that response. (d) Judges must also justify their decision only through the exercise of public reason. Two, the judges are independent. But structural suit will compromise the independence of judiciary. The remedial phase will lead judges to abandon their position of independence and to enter the world of politics and administration.

This fear is based on the ground that traditionally the remedy is tailored to fit the violation. If the violation is a 'wrong doing' then a unique remedy can be deduced from this 'wrong doing'. But in context of structural suit the violation is not a 'wrong doing' but a threat posed by the organization to the constitutional value. According to Fiss there can be many ways of eliminating the threat. Hence the judges have to make choice. The remedial phase involves making this choice. This involves the judge in politics and compromises his independence by giving up the tailoring principle.

The reply to the above argument according to Fiss is that even if tailoring principle has to be given up that does not mean that judge must play politics. According to Fiss the traditional concept of "equitable discretion" – can control the shaping of remedy and set of subsidiary considerations can be brought in to block politics at the remedial phase. According to Fiss, "These subsidiary considerations have, ...an important bearing on some facets of the party structure, the divergence between victims and beneficiaries of the decree, and also on the identity of the office or agency that bears the burden of the remedy."[65] According to Fiss, these subsidiary considerations "also give the structural decree a tentative and hesitant character."[66] He further writes, "These subsidiary consideration also explain the specifics usually found in the final stages of a structural injunction."[67]

Even if subsidiary considerations are taken into consideration and politics is avoided at the remedial stage yet it remains a fact that the structural remedy involves a judge deeply in the organization for a considerable period. This coupled with the desire of the judge to be effective in implementation of the remedy whatever that may be, may compromise the independence of judges since "practical success vitally depends on the preferences, the will, of the body politics."[68] But this is a dilemma which we have to face. "Independence is a critical element in the process that legitimates the judicial function, for having us believe that judges can articulate and elaborate the meaning of our constitutional values, and yet to fully discharge that function, to give that meaning a practical reality, judges are forced to surrender some of their independence" according to Fiss.[69] Is there no way out of this dilemma?

At this stage one may be tempted to argue that this dilemma is created not because judges are discharging the duty of giving meaning to constitutional values but because they are trying to enhance the worth of these values which is the job of legislative branch. The desire to create countervailing power to protect the individual or group of individuals against the

power of institutions is the job of legislature, as it is the responsibility of the legislature to implement the second principle which says in part that the power of the downtrodden be increased. So the entire enterprise of structural adjudication must be abandoned to escape the dilemma.

But this solution of the dilemma must be resisted, as the courts are not trying to usurp the legislative function. Rather my claim is that, looked at from the perspective of Rawls's theory of political justice, we are facing the problem of coming to an agreement about the first constitutional essential. That is to say we are facing the problem of coming to an agreement about "fundamental principles that satisfy the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule..."[70] Now essentials of this kind can be specified in various ways. Rawls mentions only two alternatives, presidential or cabinet government.[71] But we have also variation regarding judiciary: should judiciary have power to entertain structural litigation or should there be no such power in the hands of judiciary. Other things remaining the same, which constitutional arrangement is more conducive to achieve just outcome: one with judiciary having power to entertain structural suit or one with judiciary having no such power? In Rawls's scheme of things under the changed social reality which he takes note of, the first alternative appears to be superior.

The reason for the above conclusion is that the constitution which opts for the first alternative embodies the constitutional essentials of the second kind also. The second kind of constitutional essential include not only the values covered by the first principle of justice i.e. basic rights and liberties but also some principle of opportunity which may include at least freedom of movement and free choice of occupation, even if it is not required to go as far as fair equality of opportunity.[72] These second kind of constitutional essentials according to Rawls, include some social minimum providing for the basic needs of all citizens even though the difference principle or the second principle of justice is not included under this kind

of constitutional essentials.[73] In the changed social reality where individuals are at the mercy of large social organizations, judiciary with the power to entertain structural suit ensures the minimum power necessary to meet the basic need of individuals and groups of individuals for protection against victimization by large scale organizations.

If this appears to enhance the value of the rights and liberties which is not required to be protected under first principle and appears as implementation of the second principle which is the jurisdiction of legislature, it is because of the embodiment of the one of the constitutional essential of the second kind i.e. "some social minimum providing for the basic needs of all citizens", in the constitution, which has the potentiality of increasing the worth of basic rights and liberties and which also is part of the second principle.

If by definition this power, which is vested in the courts by embodiment of this constitutional essential in the constitution, is called legislative power, then may be courts are exercising legislative power by definition. But dualist constitutional democracy does not envisage separation of powers on definitional lines even though it envisages distribution of power to three organs judiciary, executive and legislature. For example the legislature when indulges in impeachment proceedings or contempt proceedings it exercises judicial power. Executive when issues ordinances, exercises legislative power. Similarly when courts are entertaining structural suit, they may be exercising legislative power but that is rightfully theirs, not the one that rightfully belonged to other branches which courts are usurping. Merely by giving a name to a power it cannot be taken away from the one organ of the government to which it belongs as justified by public political morality of the society.

It was only for the sake of argument we had conceded that may be by definition the power exercised by courts in granting remedy in a structural suit, is legislative power. But in reality it is not legislative power. The difference between judicial power and legislative power is not that the latter makes law while the former does not, since legislative power results

in statute law while judicial power results in law as precedent and *stare decisis*. The real difference is that legislative power results in a law that is embodied in *canonical words* called statute, while judicial power results in law which is *not embodied in canonical words*, as the *ratio decidendi*, for operation of precedent and *stare decisis* has to be stated again and again in each new case and can differ in words each time. It is only with respect to *res judicata* that the judgement assumes the form of *canonical words*.

It may be argued that traditionally it is said that legislature makes law while judiciary merely finds or ascertains the law and applies it to the case and that is taken as the fundamental difference between the legislative power and judicial power. The reply to this is two fold. First, so far in the history of legal theory, there is no theory of legislation that makes it a case of *making or creating* law as it is mistakenly believed. In natural law tradition legislation is nothing but ascertaining the natural law by legislature and giving it a *canonical statement*, (i.e. giving it as a statute). Legal positivism from Bentham to Hart takes legislation as nothing but *ascertaining* the law in the present situation by application of principle of utility, the one, ultimate law known and all other laws or statutes are nothing but subordinate statement of this law for the situation at hand. Even though for early positivists, positive law is the general command of the sovereign yet it was not understood as making law but application of principle of utility. The will of sovereign attaches to the canonical statement i.e. statute and not to the law. Even though framers intent is taken as the law in theory, no positivist was foolish enough to advocate that if the legislator is living then we can go to him directly and ask what his intention was, as we will be required to do if the will attached to the law. The will or intent attaches to the *words* and the law has to be ascertained from these words by interpretation. Second, if we take the view that the legislature creates or makes the law seriously and the view that judiciary merely finds the law, then the present form of precedent and stare decisis has to be given up.

So the view we arrive at is that law has to be ascertained both by legislator who can embody it in a canonical statement and judiciary who cannot embody it in a canonical statement. There now arises the possibility of skirting the issue of politics and loss of independence on the part of judiciary if it exercises the power of granting remedy in a structural suit. The illusion of politics being played is created because of wrong conceptualization of judicial power even in the structural suit. Courts are not making choice or exercising will rather discovering and ascertaining the law to arrive at a judgement regarding the remedy to be granted. For this we need a proper theory of interpretation and judgement commensurate with the task of structural suit. To give even a bare outline of such theory is beyond the scope of this paper.

VI. Guide-Lines for Exercise of Judicial Power

As I explained, by wrong conceptualization of judicial power we have created an illusion of a dilemma: judiciary has the power to grant remedy in structural suit, vested in it because of its independence but in the exercise of that power there is a danger of compromising that independence. So far the attempts to circumvent the dilemma by leaving the burden of choosing and implementing the remedy entirely on the defendant, or by creation of a new procedural institution called special masters or by use of a multitude of judges in the litigation or by the creation of a strong representational structure have failed. Of course the dilemma can be resolved by allowing the judges only the power of declaration of rights but that will violate the public political morality by derogating from the power that is rightfully the court's power i.e. the power to enforce the rights. So we have to reconceptualize the exercise of judicial power to avoid the problem of illusion of loss of independence of judges in structural litigation. The solution we have to seek, depends on the idea that courts ascertain the law through interpretation and find the remedy in judgement. There is no choice involved or exercise of will involved on the part of judiciary. Hence the fear of loss of independence of judiciary due to power struggle involved in

making a choice is ill founded to also any solution of this fear in any external restructuring of the structural litigation is misguided. What we have to spell out clearly, so that courts can ascertain the correct remedy is the principle on which the ascertainment of remedy is based. That means we have to spell out the details of public reason going beyond what Rawls has done.

Let us undertake that task in a very brief outline only.

Before the coming into being of intermediary corporate entities like political parties, business organizations, bureaucracy etc. man's *action* was characterised by the following four factors according to Jonas.[74] Firstly, the technology available to man could neither damage the object of technology i.e. nature permanently nor required any permanent reconstitution of the psyche of the subject i.e. the man to suit the technology. Hence as far as its effect on nature and man was concerned technology was neutral and hence man's dealing with nature was ethically and juridically neutral. Secondly, since effect of man's action on nature was ethically and juridically neutral the ethical and juristic significance belonged to the direct dealing of man with man. Thirdly, in the domain of man dealing with man, the entity man and the basic condition in which man dealt with man, was constant in essence and not itself subject to change due to man's action and technology employed in the action of man. And fourthly and lastly, the good and evil about which action had to care lay close to the act. That is to say, the good and evil either resided in the action itself or in its immediate reach both in space and time and hence no remote planning was required while acting. The effective range of action was small, the time span of foresight, goal setting, accountability was short and control of circumstances was limited. Proper conduct had its immediate criteria and almost immediate consummation. The long run of consequences beyond was left to chance, fate or providence. Ethics and law accordingly was of the here and now, of occasions as they arise between men, of the recurrent, episodic, typical situations of private and public life.

When the intermediate corporate sector emerged intermediate between the man and the society as a whole, corporations and institutions were subsumed under the category of 'person' and were distinguished from men by the qualifier 'jural' or 'artificial', man being 'natural person'. In this way the concept of obligation and duty applicable to man were extended to make them applicable to corporations and institutions. This step was legitimate since emerging intermediate corporate sector and its actions were also characterised by the four conditions mentioned above.

But now the nature of the corporate sector as well as the corporation funded research generated technology has changed in such a manner that the four conditions mentioned above do not hold good.

Consider a political party. After the anti-defection law political party has gained considerable power to affect the whole body politic. Consider a legislature of 420 members of say three political parties. Now if the legislature is hung the legislature behaves not as a democratic deliberative body of 420 members but as an assembly of three anties with varying voting power guided with three whips respectively. Similarly if a party gains clear majority it behaves like an assembly of one entity i.e. it behaves like a tyrannical power or monarchical power due to anti-defection law. Because of this law individual members of legislative bodies do not count much but party as an entity with a whip is more significant in the legislative deliberations. So we can say after the anti-defection law the legislative assembly instead of functioning as a democratic legislature, functions as oligarchic/aristocratic body of Greek political theory if the legislature is hung and as a tyrannical/monarchical body if there is a clear majority of one party. So without violation of any law, without any 'wrong doing' i.e. without any non-fulfilment of obligation or breach of duty because of anti-defection law, political parties have changed the complexion of body politic to destroy its democratic character permanently, given the character of parties as they are presently.

The business corporations like multinationals have now the technology and hence power to destroy the nature permanently so as to make it inhospitable to mankind and thereby make it impossible for man to enjoy his rights including the right to life. Hence the action of corporations on nature is no more juridically neutral.

The corporate sector is also effecting through its technology man himself. Man is 'unframed' to consider himself as 'homo-faber' to suit the technology while the true vocation of man is to be 'homo-sapien' and not 'homo-faber'.

Not only that, the nature of corporate entity is also not fixed any more. The very corporation-funded research-generated technology once adopted, changes the corporation's organizational setting to suit the technology adopted.

So the problem of interaction of corporations with individuals and groups of individuals and the problem of effect of interaction of corporations with nature, on nature and man cannot be solved by extension of the concept of obligation and duty to corporations, by subsuming the corporations under the category of 'persons' in law. Rather we need to think afresh to generate principles for the ascertainment of the remedy in the structural suit consistent with the principles of justice.

For this purpose, we will look at the concept of responsibility. 'Responsibility' has two different meanings according to Jonas.[75] In one sense 'responsibility' means being accountable "for" one's deeds whatever they are; and in the second sense it means responsibility "for" particular objects that commits an agent to particular deeds concerning them. In the former sense one is responsible for what happened and in the latter sense one honors his responsibility.

In the formal and causal attribution of deeds done with a sense of responsibility, one is responsible if he does the act. It means the doer must answer for his deeds. He is responsible for its consequences and where the case warrants, he is made liable for them. The damage must be made good

and wrong must be punished. In case of damages being made good, whether the causality emanates from the accused concerned, is investigated and in criminal liability apart from the causality of the deed, the quality of action is also investigated for design, premeditation motive, accountability etc. In this case it must be noticed that though the action emanates from the agent yet 'responsibility' becomes real when the doer is being made responsible by others.

The substantive responsibility which is positive duty of power is vastly different from the account of responsibility given above. It concerns not ex post facto account for what has been done, but is related to fore determination of what is to be done. In this sense one *feels responsible* not in the first place for one's conduct and its consequence, but for the matter that has a claim on one's acting. What for one is responsible, is distinct and separate from itself, yet in the effective range of his power, in need of it or threatened by it. What for one is responsible confronts his power with its rights guaranteed by justice and enlists it for itself through these rights.

This kind of responsibility is nonreciprocal in relation since it is not between equals. The child is the responsibility of the parents in this sense. This responsibility is natural and not contractual. That is to say, this responsibility arises not because of choice or assent but because the agent has the power. Hence it is not given to alteration of its terms by the participants. So the responsibility of the corporations is the natural correlate of the power they have.

The primary objects of this responsibility are the other human subjects with their rights. This responsibility encompasses the total being of their objects with rights, that is, all the aspects of them, from bare existence to highest interest in development and exercise of the two moral powers. That is to say, the corporations have to take care of everything so that nothing is adversely affected in their achievement of goals because they have enormous power. The corporations must function to achieve its goals among the human beings

with felt solidarity. The corporations need to be so organised that functionaries of the corporation act with solidarity of fate with the humans among whom their corporation functions. The public in which the corporations act is itself vulnerable and hence corporations need to operate with the consciousness that issues of common welfare do not simply look after themselves but require conscious direction and decision and improvement. That is to say, the corporations have to operate with the recognition that corporations' own cause is included in the public cause and hence it cannot pursue its cause in disregard of the public cause. The corporation has to recognize that it itself is a creature of the human community whose cause therefore has to be served in its own cause.

This total responsibility of the corporations to take care of the cause of the community in the pursuit of their goals is continuous. This continuity of concern through time must preserve the identity of the community in which the corporation pursues its goal. And lastly this responsibility of the corporation includes the responsibility for a life be it individual or communal beyond its immediate present. The corporations must pursue goals with concern for the future so that their pursuit of goals do not endanger the life of man and his community in future.

The remedy sought in the structural suit is to reorganize the corporation in a manner that makes it behave in a responsible manner as outlined above towards the individuals who have rights and liberties granted by justice.

Be it noted that as social justice requires that individuals conform to the principle of fairness and natural duties, it also requires corporations to be responsible in the sense outlined above. Any corporation which is irresponsible offends the principles of justice by destroying the very conditions in which principles of justice can be followed.

A political party issuing a whip to vote on a bill in a particular manner to its legislators yet not having its organizational elections or not having a democratic constitution is irresponsible in the sense mentioned above even if it violates

no law there by. Similarly corporations earning profits but discharging toxic affluent in rivers making fresh water scarce for public are acting irresponsibly. Educational institutions whether they charge fees or funded by the society when fail to teach for the minimum periods per annum fixed by law or competent authority, or not able to hold examinations on time holding careers of students to ransom, are also acting irresponsibly. This kind of situation calls for public interest litigation to reorganise these corporate entities to make them act with responsibility.

Previously, sense of responsibility did not play any important role because law was concerned with strengthening the institutional and social ordering that would assure such permanence that next generation steeped or educated in law is seen as repeating the same social order. To use a metaphor generations lived in the same social building with same furnishings. That is to say, law is premised on permanence of the social order which is threatened only by inscrutable fate. That is to say, the law is premised on the absence of that dynamism which dominates all of modern existence and consciousness. But the coming of age of the corporations has changed this static premise and we moderns are caught up in perpetual change induced by the plethora of corporations. But now since corporate world is responsible for the fast change they need to be responsible agents unlike the individuals who never had such power of change.

Not only that, the law and jurisprudence as it exists is basically an *a-temporal* enterprise which is reflected in the episodic character of its judgement, wrong, remedy discussed before. But functioning of the corporate sector has forced the *temporality* into the heart of law since the acts of corporate world do not seem to exhaust in time and hence time frame has to be taken into account in the functioning of the corporations requiring sense of responsibility.

The traditional theories of law are based on the fear of the content of 'ought' of law over-stripping the ability of man and hence it became one of the principle of rule of law that

'ought' implies 'can' and hence what a man can't do he cannot be commanded that he ought to do. But now we have a different scenario. The power of corporate world is constantly over stripping the do's and don'ts of law, thereby, constantly going unregulated by law. And hence the need for law based on the idea of sense of responsibility. Whether there is an explicit do or don't of law to regulate the power that any corporation recently acquires, it must inherently by its nature regulate this power by its sense of responsibility.

Rawlsian theory of justice is based on, among other things, the idea that "The role of the institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations take place. Unless this structure is appropriately regulated and adjusted, an initially just social process will eventually cease to be just, however free and fair particular transactions may look when viewed by themselves."[76] Not only that "the conditions necessary for background justice can be undermined, even though no body acts unfairly or is aware of how the over-all result of many separate exchanges affects the opportunities of others. There are no feasible rules that it is practicable to require economic agents to follow in their day to day transactions that can prevent these undesirable consequences. These consequences are often so far in the future, or so indirect that the attempt to forestall them by restrictive rules that apply to individuals would be an excess if not an impossible burden."[77] As we have noted this tendency for background justice to be eroded even when individuals act fairly is due to the power of institutions and corporations always outstripping the existing legal rules. Hence there is need for readjusting and restructuring of these background institutions and corporations if their functioning results in injustice even if no wrong is done by any body or no obligation is violated. Hence the need to maintain the justice and fairness of the institutions and corporations is their responsibility in the sense of responsibility outlined above, and restructuring can be done by courts to make these institutions and corporations responsible agents.

It is because of the sense of responsibility that the higher judiciary is restructuring the process of litigation in front of it by reinterpretation of its role in a dualist constitutional democracy because judiciary itself is now a corporate entity with enormous power.

The discharge of responsibility is dependent not on making *choice* and acting with *will* but on interpretation by which it discovers the law and the judgement by which it discovers the right course of action. So sense of responsibility is dependent on theory of interpretation and judgement. Since the discussion of the theory of interpretation and theory of judgement is beyond the scope of this paper, these issues will be taken up at some other occasion.

Let me end this essay with reply to an objection that may be raised against this essay. The objection is that Rawls's theory of justice is based on the idea of contract in the original position which is expected to regulate the power distribution, but now we have brought in a noncontractual natural correlate of power to control it. Is it not a contradiction? The answer is that Rawls's theory is not contract based throughout, rather the idea of contract in the original position plays a limited role of discovery of principles of justice to regulate institutional complex and principles for individuals. But the possibility of his justice as fairness being "the focus of an overlapping consensus of at least the reasonable comprehensive doctrines affirmed by its citizens"[78] refers to a non-contractual aspect of his theory. The idea of overlapping consensus is developed to take care of "the appearance within the same society of a rival authoritative and Salvationist religions"[79] as a feature of modern social reality. We have merely extended the idea to take care of any kind of diverse institutions and corporations and not limiting ourselves merely to churches. The possibility of overlapping consensus itself depends on the sense of responsibility of these corporate entities, a sense that these corporate entities have included the judiciary itself as a corporate entity as one among these corporate entities.

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